

***THE EMPLOYMENT & LABOUR RELATIONS TRIBUNAL HEARING
BETWEEN
MARCUS WILLIAMS
AND***

Members of Tribunal:

Mr. Robert K. Horton
Mr. Paget Wharton
Ms. McKeisha Smith

Hearing Date:

28th July 2021

Matter in Dispute:

Unfair Dismissal

Preliminary:

This case was heard by the Employment & Labour Relations Tribunal in accordance with the provisions of the Trade Union And Labour Relations (Consolidation) Act 2021 (the Act)

Complainant:

Mr. Marcus Williams

Respondent:



**IN THE MATTER OF TRADE UNION AND LABOUR RELATIONS
(CONSOLIDATION) ACT 2021 BEFORE THE EMPLOYMENT AND LABOUR
RELATIONS TRIBUNAL ("the BOARD")**

BETWEEN

[REDACTED]

Claimant

AND

[REDACTED]

Defendant

DECISION

Date of Arbitration Hearing: 28th July, 2021

Terms of Reference: To determine whether [REDACTED] was unfairly dismissed from his employment at [REDACTED] and to make a binding award.

Present:

[REDACTED] ("the Claimant" / "MW")
[REDACTED] ("the Defendant")
X X X X X X X X X X ("KW")
X X X X X X X X X X X X
[REDACTED] ()
[REDACTED]
(")

1. The Claimant was employed as a [REDACTED] from April 2010 until his termination on 8th February, 2019.
2. The Claimant informed the Board that he had been very good at his work which involved [REDACTED] within [REDACTED] property. The Claimant expressed the view that his service at the [REDACTED] had been terminated 'unfairly and with malice' as the [REDACTED] management seemed to be 'out to get him'. The Claimant wished to make clear that he assigned no blame to [REDACTED] in this regard, making the point that she had always supported him and that initially she had approved his revised travel dates.

3. The Claimant stated that he traditionally took his annual vacation leave early in the year as [REDACTED] was low at that time and it was easier to find other [REDACTED] to carry out his duties.
4. The Claimant provided for the Board's consideration a timeline of significant dates relating to his dispute with the [REDACTED]. This timeline was not disputed by the Defendant.
 - 26th November, 2018 – The Claimant filed a Time Off Request Form (“TORF”) with the [REDACTED] Front Office staff. It is to be noted that the referenced TORF carried the dates 11th February, 2019 – 10th April, 2019. The [REDACTED], approved the TORF on 27th November, 2018.
 - 5th December, 2018 – The Claimant purchased air and hotel tickets relating to his winter vacation early the next year.
 - 31st January, 2019 – Upon seeing that he was listed in the XXX assignment of [REDACTED] for the week of 4th – 10th February, 2019, a week for which he already had approved vacation leave, the Claimant e-mailed [REDACTED] regarding the conflict. The Claimant indicated that he had revised his vacation dates to 4th February, 2019 – 3rd April, 2019 because he was unable to find an affordable airline ticket for the later period.
 - 1st February, 2019 – The Claimant met with [REDACTED] to discuss the conflict between the posted work schedule and the TORF which showed approval for the period 11th February, 2019 – 10th April, 2019. The Claimant said that [REDACTED] agreed to assist in finding other [REDACTED] who could work during the period 5th – 10th February, 2019 when he had been assigned to work.
 - 4th February, 2019 – The Claimant departed Bermuda for his annual winter vacation.
 - 8th February, 2019 – The Claimant's services with [REDACTED] were terminated. The [REDACTED] document *Employee Action Form*, signed by [REDACTED] [REDACTED], and submitted in evidence by the Claimant indicates that his services at the [REDACTED] were terminated as he had '*abandoned his job: 3 no-show consecutive on February 5th, 7th and 8th*'.
5. The Claimant informed the Board that the TORF was at the centre of his dispute with the [REDACTED]. He reiterated that initially he had submitted a TORF with respect to the period 11th February, 2019 – 10th April, 2019, but upon realizing that these were the wrong dates, he re-submitted a TORF for the period 4th February, 2019 – 3rd April, 2019. He said that he recognized that there was a problem when the [REDACTED] roster for 4th – 10th February, 2019 was posted showing that he was to work during that week. He reiterated that he had immediately brought the matter to the attention

of [redacted] who then invited him to identify [redacted] cover the shift as he had made the error. He went on to say that [redacted] worked collaboratively with him to identify colleagues who would be able to cover work assigned to him during the period 4th – 10th February, 2019. He said that he felt that the problem had been solved after he had spoken with [redacted].

6. The Claimant said that following his meeting with [redacted], "things began to change" and that he believed that "people were pulling strings". He said after [redacted] had given approval for the revised leave period, he was advised that permission had been rescinded as he was needed to assist with an investigation addressing an allegation that he had made following an incident at the [redacted]. He posed the following question: "If there was an investigation, why didn't I know about it from before 1st February?"
7. The Claimant drew the Board's attention to the following excerpt from the e-mail of 22nd November, 2019 that the, [redacted], had sent to the [redacted] Union Chief Shop Steward, and copied to the [redacted] [redacted] inter alia: "It is fully acknowledged that on the 1st February (a day prior to his flight departure) (the Claimant) sought & received verbal approval from [redacted] to adjust his vacation dates. However, [redacted] then retracted her approval (confirmed in writing) that same day after being informed by [redacted] that his presence was required up to the 10th February, due to the ongoing investigation." The Claimant asserted that he had no previous knowledge that an investigation involving him was ongoing; he said that he believed that the referenced investigation had concluded.
8. The Claimant acknowledged that in January 2019 he had received a three-day suspension for removing [redacted] without permission. He said that while initially he had challenged the [redacted] decision to suspend him, he had eventually accepted the suspension and therefore believed that the matter was over. He submitted in evidence his e-mail of 29th March, 2021 to the [redacted]. He drew the Board's attention to the following excerpt from that e-mail: "The idea of an 'ongoing investigation and grievance' is a gross misrepresentation as I had submitted a letter January 18th addressed [redacted] [redacted] [redacted] indicating my acceptance of the 3 day suspension and "I will not be grievancing (sic) the issue of late, rather, my objective is to learn a lesson and move forwards."
9. In his e-mail of 29th March, 2021, the Claimant, referring to his decision to leave for vacation on 4th February, 2019, also wrote: "I had acted in good faith and had done what I was asked and covered the shifts. I felt threatened by the whole process of this matter. This was an [redacted] which cost significant amount of money and an extraordinary amount of work and time to arrange. I had consulted [redacted] who advised I go and felt every step I could possibly cover had been covered. These facts are what they are."

10. Summarizing, the Claimant maintained that the ██████ should have upheld initial approval for him to take leave for the revised period 4th February, 2019 – 3rd April, 2019. He said that he did not accept the validity of ██████ charges against him or the ongoing investigation, but realized that he risked losing his job at ██████ if he left Bermuda on 4th February, 2019. He informed the Board also that he had experienced a great deal of stress as a result of his treatment by the ██████ culminating in what he believed to be his unfair dismissal.
11. KW ██████ reminded the Board that the Claimant had left on vacation on 4th February, 2019 well aware that he risked losing his job by doing so and that the Claimant had acknowledged the same in his testimony before the Board.
12. KW asserted that the Claimant was wholly responsible for the circumstances leading to the XXX decision to terminate his services. He said that there was no evidence to show that the Claimant had followed correct procedures in requesting an amendment to the original TORF which showed approved leave for the period 11th February, 2019 – 10th April, 2019, not 4th February, 2019 – 3rd April, 2019.
13. KW emphasized that there was no evidence before the Board or elsewhere to show that the ██████ had approved the Claimant's leave for the period 4th February, 2019 – 3rd April, 2019. He drew the Board's attention to an amended version of the original TORF which had been approved on 27th November, 2018. He said that this amended version showed that the dates for the requested and approved leave, 11th February, 2019 – 10th April, 2019, had been changed to 4th February, 2019 – 3rd April, 2019. However, KW pointed out, the amended TORF had not been approved by any member of the ██████ senior administration team.
14. KW, commenting upon the Claimant's evidence that he had checked with the ██████ Chief Shop Steward, who had supported his taking his leave with effect from 4th February, 2019, reminded the Board that such person had no authority to tell the Claimant what to do where his leave was concerned. KW noted with interest that whilst the Claimant had sought advice from ██████ Chief Shop Steward before going on leave in February 2019, he was not represented by the ██████ during that day's hearing.
15. KW drew the Board's attention to the ██████, signed on 15th February, 2019, which indicates that the Claimant's services had been terminated by ██████ on 8th February, 2019 as he had '*abandoned his job: 3 no-show consecutive on February 5th, 7th and 8th*'. KW asserted that the termination was justified as the Claimant had in fact purchased an airline ticket for a date that had not been approved by the ██████ he was aware that the date had not been approved, he knew there was a problem with the date and he took his chances.
16. ██████ confirmed that she was responsible for the ██████. She informed the Board that she had not seen an amended TORF and that the Claimant had contacted her on 1st February, 2019 after the

██████████' schedule for 4th - 10th February, 2019 had been published. She confirmed that she had tried to assist the Claimant in identifying ██████████ who might be able to replace him during that week and said that later that day she was informed that the Claimant was required to remain until 10th February, 2019, thus the proposed alternative leave dates could not be approved. She said that she had informed the Claimant verbally and subsequently via e-mail that the alternative leave dates had not been approved. She added that she had advised the Claimant that if he went on vacation without the required approval, his job would be at risk. "It was in MW's hands," stated.

17. The following e-mail of 1st February, 2019 from ██████████ to the Claimant was provided by the ██████████ for the Board's information: "I just want to clarify that we approved your vacation starting on February 11th. Changing your shifts is not an option. In relation to the investigation, we expect you to be available to meet with us until and including February 10th."

18. ██████████, ██████████, read for the Board's consideration the following undated witness statement regarding the termination of the Claimant's services at the X X X

"I confirm that MW was terminated for job abandonment on the basis that he failed to show up for three consecutive days for his shift.

"MW did appeal the termination and I was present at the grievance meeting when he appeared before the ██████████ on Thursday, November 21st, 2019 at 9:30 AM.

"I confirm that at the hearing and in the presence of his union representatives, MW admitted that he purchased airline tickets for dates that had not been approved. Rather than seek approval to change his dates, he entered his manager's office, removed the form and amended it to reflect his new travel dates.

"It is fully acknowledged that on the 1st February (a day prior to his flight departure) he sought & received verbal approval from ██████████ to adjust his vacation dates. However, ██████████ then retracted her approval (confirmed in writing) that same day after being informed by ██████████ that his presence was required up to the 10th February, due to the ongoing investigation into another grievance/disciplinary matter that MW was involved in.

"I have provided the various attachments which have been provided to the Board."

19. ██████████ drew the Board's attention to the following provision in the ██████████
██████████ If you are absent three (3) or more consecutive days without permission, or without modifying your leader, you will be considered as having voluntarily resigned." She said that all required

processes were carried out correctly, leading to the decision to terminate the Claimant's services.

20. The Claimant, making the point that he had worked at [REDACTED] for many years, pleaded for the Board's sympathy and understanding. He stated that his failure to adhere to correct procedures regarding the amended TORF was not because of malice or intent; it was simply an error. He said that he loved his job at [REDACTED] and had no idea that comments that he had made during the investigation into the [REDACTED] would lead to another protracted investigation. He repeated his view that the termination decision was unfair and stated that at the time [REDACTED] understood the situation with which he was confronted, but the [REDACTED] did not. He maintained that he really had no choice but to begin his vacation leave on 4th February, 2019, as he risked losing some \$10,000 had he failed to do so.
21. KW, [REDACTED] concluded his submission by stating that the Claimant did have a choice; cognizant of the possible consequences, he chose to leave on vacation on 4th February, 2019 rather than on 11th February, 2019 as approved. KW admitted that the Claimant's termination was unfortunate. However, he said, the Claimant had a responsibility to bring the problem relating to his approved travel dates to the attention of his supervisor before purchasing an airline ticket for travel on 4th February, 2019. He emphasized that there was no evidence that the Claimant had given his employer prior alert to the problem. Referring to [REDACTED] [REDACTED] said that rules were rules and that [REDACTED] had acted according to the rules in terminating the Claimant's services.
22. **Board's Deliberation**
- The Board is satisfied that the [REDACTED] decision to terminate the Claimant's services was not based on the [REDACTED]. Instead, it was based upon the Claimant's decision to take unapproved leave during a period when his services were required at [REDACTED] in connection with an investigation into allegations that he had made during the [REDACTED] investigation into the theft matter.
 - Specifically, the Claimant had written the following in his communication of 10th January, 2019 to [REDACTED] "*As I said during the meeting: I did not [REDACTED] I asked a fellow colleague if I could have a small amount [REDACTED] which I took in a small bag. As a result of my investigation and interviews I learned that the colleague felt under threat from their supervisor and did not want to support me, while the initiator of the allegation felt disrespected as I didn't ask him directly when he told me he would gladly have agreed to the simple request.*" As a result of the Claimant's statement "...the colleague felt under threat from their supervisor", the [REDACTED] concluded that that the Claimant might be suggesting that there was a hostile work environment at [REDACTED] and decided to investigate the claim further. The Board accepts that it

was for the conduct of that investigation that [REDACTED] wished for the Claimant to remain at work for the period 4th – 10th February, 2019.

- The Board agrees that the Claimant had no authority to alter the original TORF without the knowledge and approval of his supervisor and deplors the fact that he, without authorization, entered his manager's office and amended the TORF to reflect his new travel dates. The Claimant was wrong in that regard.
- The Board is satisfied that the Claimant did not have the permission of the [REDACTED] to be absent from work on 5th, 7th and 8th February, 2019. Therefore, the Board accepts that the [REDACTED] decision to terminate the services of the Claimant was in accordance with the following provision set out in the [REDACTED] *"If you are absent three (3) or more consecutive days without permission, or without modifying your leader, you will be considered as having voluntarily resigned."*
- The Board accepts that upon recognizing that he had been assigned work on 5th, 7th and 8th February, 2019, the Claimant immediately apprised [REDACTED] of the fact that he hoped to be on vacation leave on those days and sought her assistance in addressing the situation. The Board accepts also that [REDACTED] responded sympathetically to the Claimant's request and assisted him in identifying other persons who might cover the days assigned to him. However, the Board accepts also that [REDACTED], following receipt of an instruction from her superiors in the [REDACTED] informed the Claimant that permission for him to be away from work on those days had been rescinded and that he was required to be present during the period 4th – 10th February, 2019 for an ongoing investigation.
- The Board notes that [REDACTED] had reconsidered the decision to terminate the Claimant's Services. In this regard, the Board notes that on 22nd November, 2019, following a grievance meeting with the [REDACTED] held the previous day to discuss the Claimant's termination, the [REDACTED] of [REDACTED] refused to overturn [REDACTED] decision to terminate the Claimant's employment, writing as follows in his e-mail to the [REDACTED]: *"By his own admission, MW purchased airline tickets for dates that had not been approved and then falsified the prior approved dates on his Time Off Request Form. It is fully acknowledged that on the 1st February (a day prior to his flight departure) he sought & received verbal approval from [REDACTED], [REDACTED], to adjust his vacation dates. However, [REDACTED] then retracted her approval (confirmed in writing) that same day after being informed by [REDACTED] that his presence was required up to the 10th February, due to the ongoing investigation."* The Claimant's e-mail of 22nd November, 2019 concluded with the following words: *"In conclusion therefore, I find no grounds to overturn the decision to terminate MW."*
- The Board questions the urgency underpinning [REDACTED] insistence that its investigation into the harassment comments made by the Claimant could not be

delayed until his return from holiday, such insistence leading to the decision to deny him permission to be away from work during the week of 4th - 10th February, 2019.

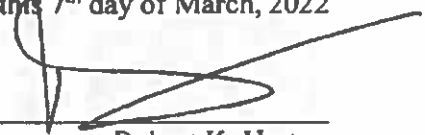
- It is the Board's view that [REDACTED] might have imposed on the Claimant a kinder response, a more sympathetic response, that is, a lesser penalty for his unauthorized absence from work on 5th, 7th and 8th February, 2019, taking into account possibly mitigating circumstances like the Claimant's inability to secure a cheaper airline ticket for travel on 11th February, 2019, his potential loss of \$10,000 had he not travelled on 4th February, 2019 and the obvious stress that he was undergoing at the time.
- Notwithstanding the observations set out in the two paragraphs immediately preceding, the Board is satisfied that [REDACTED] legitimately exercised the rights available to it as an employer in terminating the services of the Claimant.

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23. **Award**

The Board concludes that the Claimant was not unfairly dismissed from his employment at [REDACTED]

Dated this 7th day of March, 2022



Robert K. Horton
Member



Mckeisha S. Smith
Assessor



Paget J. E. Wharton
Assessor

